STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2010
v	No. 290698 Macomb Circuit Court
TRAVIS DAVID CASTILLO, Defendant-Appellant.	LC No. 2008-005192-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 40 years imprisonment for his conviction. We affirm.

Defendant first argues that he was entitled to a mistrial or curative instruction regarding testimony from Detective Gregory Hill, which defendant contends consisted of inadmissible testimony regarding prior bad acts. Defendant also argues that his counsel was ineffective for failing to move for a mistrial or to request a curative instruction. We disagree.

We review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Defendant's unpreserved argument regarding his right to a mistrial is also reviewed for plain error affecting substantial rights. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

In addition, whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the factual findings for clear error, and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

On cross-examination, defense counsel asked Detective Hill whether defendant was incarcerated in the Macomb County Jail on each occasion when Hill interviewed him, to which

Hill replied this was correct. On redirect examination, the prosecutor and Hill had the following exchange:

> *Q*. All right. And counsel asked you if on both occasions was the Defendant in custody, on the 17th of September and the 23rd of September of '08; is that correct?
>
> *A*. That is correct.
>
> *Q*. He was not in custody on this case?
>
> *A*. No.
>
> *Q*. When you questioned him on either date; is that correct?
>
> *A*. That is correct.

The record reflects that the testimony on redirect was the result of defense counsel's questions on cross-examination, which may have been asked in order to suggest something possibly coercive about defendant being interviewed while he was incarcerated in the Macomb County Jail. As the prosecution argues, once defense counsel opened the door to whether defendant was incarcerated at the time of the interviews, the prosecutor was permitted to clarify regarding whether defendant was in custody on this case. Once a defendant raises an issue, he opens the door to a full, and not just selective, development of the subject. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993); *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988). Here, the record reflects that the prosecutor merely clarified through his questioning on redirect that defendant was not in custody with regard to the instant case, but did not go into any further detail. This permitted the prosecutor to dispel the notion that there was something coercive or involuntary about Hill's interviews of defendant.

Defendant argues that the prosecutor's questioning violated MRE 404(b), which excludes evidence of prior bad acts to prove a person's character. Contrary to defendant's argument, however, the evidence was not submitted under a character or propensity theory. Rather, it was meant to dispel the inference that Hill's interviews of defendant were coercive. Therefore, defendant has failed to show plain error.

Regarding defendant's argument that he was entitled to a mistrial, while a sua sponte decision to grant a mistrial "is within the sound discretion of a trial judge," *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996), "a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Further, this Court has determined that "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Under the circumstances as a whole, Hill's testimony did not constitute an evidentiary error, and even if it was error, it was not so egregious that a mistrial was necessary. Therefore, defendant was not entitled to a mistrial.

Further, defense counsel was not ineffective for failing to move for a mistrial because counsel is not required to make futile arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, defense counsel was not ineffective for failing to request a curative instruction because the record reflects that defense counsel affirmatively decided not to request such an instruction, as a matter of trial strategy, so the jury's attention would not be drawn to the alleged error. Defense counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Therefore, defendant's claim must fail.

Defendant next argues that the trial court failed to take into account all of the mitigating evidence before sentencing him as a fourth habitual offender. Defendant contends that the mitigating factors, which included his remorse, his strong family support, his substance abuse problems, and his rehabilitative potential, were not considered. As a result, defendant contends that his sentence should be vacated. We disagree. Our review of unpreserved allegations of sentencing errors is limited to review for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

The record reflects that the trial court reviewed defendant's presentence investigation report (PSIR) and his sentence information report (SIR), and thus, there is no evidence that the trial court failed to consider any relevant mitigating evidence in sentencing defendant. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). The PSIR noted defendant's history of substance abuse. The record also reflects defendant presented the trial court with the mitigating factor of his remorse. In addition, defendant's mother also addressed the court regarding defendant's strong family support. The record reflects that the trial court considered these factors. Moreover, mitigating and aggravating factors are taken into account when scoring the sentencing guidelines. See, e.g., *People v Sargent*, 481 Mich 346, 348-349; 750 NW2d 161 (2008). Thus, defendant is not entitled to relief. Further, defendant's assertion that his trial counsel was ineffective for failing to submit further evidence of these mitigating factors lacks merit because defense counsel is not required to raise meritless objections or make futile arguments. *Snider*, 239 Mich App at 425.

Defendant also raises several additional claims of error with regard to his sentencing. First, defendant argues that the trial court erred because it failed to explain why his sentence was proportionate to the offense. We disagree. Again, our review of unpreserved allegations of sentencing errors is limited to review for plain error affecting defendant's substantial rights. *Sexton*, 250 Mich App at 227-228.

A trial court must either select a minimum sentence within the guidelines range, or it must state "substantial and compelling" reasons to justify a departure from the guidelines. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). However, "if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines," then the trial court is not required to articulate any additional reasons for the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Defendant's minimum sentencing guidelines range for this offense was scored at 78 to 260 months. The trial court sentenced defendant to 120 months imprisonment for his conviction. Because defendant's minimum sentence was based on the sentencing guidelines, the trial court was under no obligation to further state its reasons for the sentence. *People v Broden*, 428 Mich 343, 353-354; 408 NW2d 789 (1987); *Conley*, 270 Mich App at 313. Additionally, a minimum sentence that is within the sentencing guidelines, as is the case here, is presumed proportional and defendant has failed to establish otherwise. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

In addition, contrary to defendant's assertion, his constitutional rights were not violated by any judicial fact-finding at sentencing. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), relied upon by defendant, is inapplicable to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id*. In addition, because defendant's sentence was proportionate, his underlying constitutional claim is without merit, because a proportionate sentence does not constitute cruel and unusual punishment. *Powell*, 278 Mich App at 323.

Defendant next argues that he was erroneously denied credit for time served in jail between his arrest and sentencing. We disagree. Because this issue was not properly preserved by a challenge before the trial court, we review for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant's argument on this issue is unavailing because there is no dispute that defendant was on parole when he was arrested. MCL 769.11b, the jail credit statute, does not apply to parolees who commit new felonies while on parole, such as defendant in this case. *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009). MCL 769.11b does not apply in such circumstances because the defendant parolee continues to serve out any unexpired portion of his earlier sentence, and was therefore not in jail because he was "denied or unable to furnish bond" for the new offense, but for an independent reason. *Id*. at 562-563, quoting MCL 769.11b. Further, a sentencing court does not have the common law discretion to grant credit against a parolee's new minimum sentence in contravention of the statutory scheme. *Id*. at 552. Finally, contrary to defendant's argument, the denial of credit against a new minimum sentence does not violate the double jeopardy clause, equal protection clause, or due process clause of the United States or Michigan constitutions. *Id*. at 552. Thus, defendant has not demonstrated plain error.

Defendant also argues that the trial court erred by ordering him to reimburse the county for the expenses of his court appointed counsel without first considering his ability to pay. We disagree. Because there was no objection to the trial court's order that defendant reimburse the county for court appointed attorney fees, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Previously the rule in this context was that, before ordering an indigent defendant to reimburse the county for the cost of his or her court appointed attorney, the trial court was required to "provide some indication of consideration, such as . . . a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), overruled by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). However, the

Michigan Supreme Court announced that "*Dunbar* was incorrect to the extent that it required a court to conduct an ability-to-pay analysis before imposing a fee for a court appointed attorney," and that "*Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing." *Jackson*, 483 Mich at 275, 290. Rather, the ability to pay assessment is only necessary when the "imposition [of fees for a court-appointed attorney] is enforced and the defendant contests his ability to pay." *Id.* at 298. Because an ability to pay analysis is not required at sentencing before imposing such a fee and the imposition of such fee has yet to be enforced in this matter, defendant's claim necessarily fails.

In addition, defendant argues that there is insufficient evidence to support his conviction for first-degree home invasion. Defendant contends that the prosecution failed to present any evidence that he intended to commit a larceny. We disagree.

We review a challenge to the sufficiency of evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, 440 Mich at 514-515. Therefore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). Defendant was tried under the theory that he intended to commit a larceny within the dwelling and defendant only challenges whether there was sufficient evidence to show that he had the intent to commit larceny.

"Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). A defendant's breaking and entering cannot be the sole basis on which to presume intent to commit larceny, but a reasonable inference of intent may be based on the nature, time, and place of defendant's actions before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). In addition, a defendant's intent can be proven by circumstantial evidence, including "the act, means, or the manner

employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

The evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of first degree home invasion. According to the trial testimony, at approximately 9:30 a.m. on the date of the incident, Georgia Masouridis was alone at a condominium owned by her sister and her sister's boyfriend (who were both at work). Georgia heard a noise and when she went to investigate, discovered that the sliding glass door and the screen door on the back of the dwelling had been dislodged. Georgia saw two males running away from the glass door. Although Georgia did not see the faces of the two males, nine fingerprints matching defendant's fingerprints were recovered from the sliding glass door. The evidence established that defendant had previously been a frequent visitor to this condo because he was a friend of one of the owners, but that defendant had not been there in at least a month prior to the incident. In addition, the evidence showed the sliding door glass had been cleaned only two days before the incident.

Based on the evidence, the jury could have drawn a reasonable inference that defendant, because of his familiarity with the condo owners, believed he was breaking into the condo through the backdoor at a time when both occupants were at work. When unexpectedly confronted by Georgia, defendant fled. Based on defendant's behavior and familiarity with the location and residents, the jury could have drawn a reasonable inference that defendant's timing and behavior showed that he had the intent to commit a larceny. There was sufficient evidence to support defendant's conviction.

Lastly, defendant argues in his Standard 4 brief that the court lacked subject-matter jurisdiction. We disagree. Whether a lower court had subject matter jurisdiction is a question of law that we review de novo. *People v Clement*, 254 Mich App 387, 389-390; 657 NW2d 172 (2002).

"The circuit court is a court of 'general jurisdiction,' MCL 600.151, having 'original jurisdiction in all matters not prohibited by law....' Const. 1963, art. 6, § 13." *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998). See also MCL 600.601. And, we have long recognized that circuit courts have original jurisdiction over criminal cases involving felonies. See, e.g., *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994). Because first-degree home invasion is a felony, the trial court had subject-matter jurisdiction over this case.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering